1954.

File No. O Medical Practitioners/41

Legal **DEPARTMENT**

A **BRANCH**

Subject:—

Opinions under the Bombay Medical Practitioners Act, 1938

P-29

File No. O. Medical Practitioners/41

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279-A

C O N T E N T S.

Legal Department File No. 0.Medical Practitioners / 1941.

Sr. No.	Compilation No.	Subject	Pages
		Bom. Medical Practitioners Act, 1938.	
1.	R.I.No. 9398/40 O.No.314/15-1-41	Sec.30(1)(h)-Whether a regulation can be framed under by the medical Board whether the draft regulation would be in order.----	1-6
2.	R.I.No.1722 dt. 19-2-41 O.No.3346/17-4-41	Whether there is any provision in the Act for an appeal to Govt. from the decision of the Board in the matter of recognition of teaching institutions which have not been authorised to hold qualifying examinations	7-12
3.	O.No.6322 dt. 17-7-41	Whether in view of sec. 32(2) the authority of Govt. is necessary for an ~~anti~~ institution holding the preliminary examinations leading upto the qualifying examination	13-16
4.	R.I.No.6346/41 O.No.6940/7-8-41.	Whether the quack oculist would be liable to be prosecuted under sec.337 or 338 I.P.C. if the act done ~~in~~ by him result in injury	17-20
5.	R.I.No.6864/ 2-8-41 O.No.7071/11-8-41	Whether the presumption that the comstitution of the proposed examination Board will not conflict with any of the provisions of the Act is correct.	21-24
6.	R.I.No.6512/24-7-41 O.No.7076/11-8-41	Whether there will be any legal objection to exempting students who have passed from the Bomb Homeopathic college during the years 1938-41. from the operation of sec 32	25-26
7.	O.No.8306/22-9-41	Sec. 30(1) Whether previous sanction of the provl. Govt. should be obtained by the Board for making regulations under	27-28
8.	O.No.360-L/ 30-10-41	Sec. 32 ~~xxxxxxxx~~ where there is any objection under to his giving entirely gratutions and free treatment to his patients without derving any profit in which case he would not be held to be practising for personal gain.	29-30

S.A.K.

21-4

Submitted.

2. Please see G.D. office note. at p .7=11 ante. Section 22(2) of the Bombay Medical Practitioners' Act, 1938 provides for the recognition of institutions by the Provincial Govt. on the recommendation of the Board by a notification in the Gazette as being authorised to hold qualifying examinations. The G.D. is of the view that as there is no specific provision in the Act providing for the recognition of <u>institutions giving instructions</u> in the courses of study leading upto qualifying or prior examinations but not holding the ~~exam~~ examinations themselves, regulations under section 30(1)(h) can be framed by the Board with the approval of the Provl Govt. for recognition of such institutions. The questions for consideration of the R.L.A. are (1) whether the Board can frame regulations for recognition of institutions ~~for~~ giving medical ~~ins~~ instructions in the Indian systems of medicine but not holding examinations themselves under section 30(1) (h) of the Bom. Medical Practitioners' Act, 1938, and, if so, (2) whether the draft regulations at p. 5 ante, as modified by para. 2 of G.D. Gln. dated 20-11-40, at pp. 9-11 ante, would be in order.

3. <u>Question (1)</u> :- Under section 30(1)(h) of the Bom. Medical Practitioners' Act, 1938 the Board may with the previous sanction of the Provl. Govt. make regulations not inconsistent with Part II or the rules for all matters which may be necessary for the purposes of carrying out the objects of that Part. Under sub-section (1) of section 22.

the Board shall prescribe by regulations the course of training and qualifying examinations including the course of training and examina - tions prior to qualifying examinations. sub-section (2) of the section provides for recognition of institutions holding qualifying examinations. Sub-se-ction (3) provides that it shall be the duty of the Board to secure the maintenance of an adequate standard of proficiency for the practice of the Indian systems of medicine including the subjects of medicine, surgery and midwifery. It further provides that for the purpose of securing such standard, the Board shall have authority to call on the governing body or authorities of any institutions giving instruction and on any examining body authorised by or desirous of being authorised under sub-section (2) to furnish it with such particulars as stated in clause (a) and to permit inspectors to attend and be present at all or any of the qualifying or prior examinations under clause (b). Thus it will be seen that provision for recognition of institutions aut orised to hold qualifying examination is made under section 22(2) of the Act. Under section 23 the Provl. Govt. is empowered by Notificationin the Gazette to direct that the name of institutions specified under section 22(2) should be removed if the course of study and examinati-ons prescribed are ot such as to secure the maintenance of an adequate standard of proficiency. But this will not enable the Board to enforce compliance with the provisions of clauses (a) and (b) of sub-section (3) of section 22 unless it has power to grant or withhold recognition in the case of institutions giving instructions but not holding examinations. .

S.A.K.

It appears therefore that the Board can frame regulations fo. the control of such institutions under section 30(1)(h) of the Act. The view taken by the G.D. in para 1 of its office note at pp. 7-9 ante appears to be correct.

4. Question (2) The draft regulations forwarded by the G.D. may, if necessary, be scrutinised in S.Br.

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The first question raised for consideration of the R.L.A. is whether a regulation can be framed under sect. 30(1) of the Bombay Medical Practitioners' Act, 1938 requiring that every institution giving instructions in the Indian System of Medicine ac ording to the course of study prescribed for the qualifying examination should obtain a recognition from the Board.

2. Section 32(2) of the Bombay Medical Practioners' Act, 1938 provides for notifying in the official Gazette the names of institutions authorised to hold qualifying examination . Under sub-section (3) it is the duty of the Board to secure the maintenance of an adequate standard of proficiency for the practice of the Indian Systems of Medicines and it has power to prescribe by ~~regulations~~ regulations the course of study. Section 23 gives power to Govt. to remove the intitutions authorised to hold qualifying examinations if it shall appear to Govt. that the course of study and examinations prescribed

S.A.K.

by such institution specified in the notification under section 22 are not such as to secure the maintenance of an adequate standard of proficiency. It is therefore clear that there is no express provision in the Act requiring that every teaching institution should obtain recognition from the Board

3. Section 30(1) of the Act provides for power of the Board to make regulations for all matters under clauses (a) to (h). Clause (c) provides for power to make regulations prescribing the course of study for training and qualifying examination. Clause (h) provides for power to make regulations for all other matters which may be necessary for the purposes of carrying out the objects of this Act. To maintain the standard of efficiency is one of the objects of the Act and to achieve that object it is necessary that the institutions giving instructions to boys should be efficient and unless there is the power of recognition vested in the board, the institutions would not care to maintain efficiency. Consequently such power can be taken by the Board under clause (h) of section 30(1). Moreover, under clause (e) the Board has power to regulate admission of students to bodies and institutions authorised under section 22. Therefore under this provision it would be competent for the Board to make a regulation allowing the admission of students of recognised teaching institutions only to institutions authorized under section 22. If such a regulation is made all institutions which want to give instructions to students appearing for the qualifying examination wouldbe required to obtain recognition from the Board.

S.A.K.
24-4

Office of the R.L.A.

Paragraph 1 of the G.D. office note (pages 7-9 ante):-
The view taken in this paragraph that the regulation at p.6 ante can be made under section 30(1)(h) of the Bombay Medical Practitioners' Act, 1938, is correct.

2. Paragraph 2 of the G.D. office note (pp. 9-11 ante):-
The suggestion made in this paragraph is legally feasible. The regulation suggested by the General Department is legally in order.

O.C. Sd/- P.N.M.
Remembrancer of Legal Affairs.

U.R. to the G.D., No. 314, dated the 15th January 1941.

S.A.K.
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1722/19-2-1941.

Submitted with reference to para 2 of G.D. note dated 15-2-41.at p. 7-8- ante.

2. The question raised for consideration of the R.L.A. is whether there is any provision in the Bombay Medical Practitioners Act, 1938 for an appeal to Government from the decision of the Board in the matter of recognition of teaching institutions, which have not been authorised to hold qualifying examinations.

3. So, far as the institutions which are purely teaching institutions and which have not been authorised by and are not desirous of being authorised under section 22(2) to hold the qualifying examination are concerned their recognition by the Board will be entirely a matter in the discretion of the Board. There is no provision in the Act for control by Government in the matter of such recognistion of teaching institutions by the Board.

4. If, however, any of the teaching institutions is desirous of being authorised under section 22(2) to hold a qualifying examination such authorisation is to be granted by Government on the recommendation of the Board. Government can for this purpose call for the recommendation, if any, of the Board in the case of any institution on institutions.

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s pointed out by the A.L.A. in his opinion No. 314, dated 15-1-41 it is competent for the Borad to frame a regulation with the sanction of Govt. under sec. 30(1)(h) of the Bombay Medical Practitioners Act, 1938 providing for power to recognise teaching institutions. If a regulation is framed for the purpose by the Board it would be for that body to grant or refuse recognisation to any particular teaching institution which has not been authorized to hold qualifying examinations and its decision will be final. Govt. will have no power to interfere with the decision of the Board. The view taken by G.D. in its office note at p. 7 ante A is correct.

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Office of the R.L.A.

The view taken by the General Department in its office note at page 7 ante is correct.

O.C. Sd/- P.N.M.

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U.R. to G.D. No. 3340, dated the 17th April 1941.

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Office of the R.L.A.

The question for consideration are:-

(i) Whether, in view of section 22(2) of the Bombay Medical Practitioners Act, 1938, the authority of Government is necessary for an institution holding the preliminary examinations leading up to the qualifying examination.

(ii) If such authority is necessary, whether institutions authorised to hold the qualifying examination are the only institutions which can be authorised to hold the preliminary examinations.

2. The expression 'qualifying examination' is defined in clause (7) of section 2 of the Bombay Medical Practitioners Act, 1938, to mean the examination held for the purpose of granting a diploma conferring the right of registration under the Act. Sub-section (2) of section 22 provides that "a qualifying examination shall be an examination in the Indian systems of medicine including the subjects of medicine, surgery and midwifery held for the purpose of granting a diploma conferring the right of registration under this Part, by any of the institutions which on the recommendation of the Board may be specified by the Provincial Government by a notification in the Official Gazette as being authorised to hold a qualifying examination". It is true that this section requires the Provincial Government to specify the institutions authorised to hold qualifying examinations only. In sub-section (5) of section 22, however, the expression used is "every qualifying examination and every prior examination leading up to it held by the bodies for institutions authorised under this section etc." The expression underlined covers both the 'qualifying and ' prior examinations'.

S.A.K.
24-4

This makes the intention of the Legislature quite clear that prior examinations are also to be held by bodies or institutions authorised under the section. The Regulations show that a 5 years' course is prescribed for the complete study of the Ayurvedic system, and a 4 years' course for that of the Unani system. The former system has four examinations at stated intervals in the course, all of which must be passed before grant of the diploma. The latter system has two examinations which must be similarly passed. The regulations refer to the aggregate of the examinations as " qualifying examinations" (see the heading at page 1256 of Bombay Government Gazette dated 26-12-1940). The prior examinations are thus inseparably bound up with the final examination, and it is obviously intended by the legislature that the authorised body which holds the final examination should also hold the prior examinations. Both the questions are therefore answered in the affirmative.

O.C. P.N.M.
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U.R.to G.D. No. 6222, dated the 17th July 1941.

S.A.K.

24-4

Office of the R.L.A.

Section 32 of the Bombay Medical Practitioners Act, 1938, clearly debars a quack oculist from practising and section 34 penalises such practitioner. A quack oculist in addition to being liable under section 34 of the Bombay Medical Practitioners Act will also be liable to be prosecuted under section 337 or section 338 , Indian Penal Code. He may however try to seek shelter under section 88, Indian Penal Code, by pleading that he did it in good faith and with the consent express or implied of the person concerned. But when a question arises as to whether a person acted in good faith, then, the onus rests upon him to show not merely that he had a good intention, but also that he exercised such care and skill as the duty reasonably demanded for its due discharge (see Gaya Din (1934) 9 Luck. 517). "The Law Commissioners observe that this section will not excuse dangerous operations performed by unqualified persons: 'We apprehend that an unqualified and ignorant quack could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life but by misrepresentation; and such a one could hardly satisfy a court of justice that he had undertaken the operation in good faith under this section, for good faith must surely be construed here to mean a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant" (vide page 194 of Ratanlal's Law of Crimes, 15th Edition).Where a person uneducated in the art of surgery operated on a man for internal piles by cutting them out with an ordinary knife and the man died from haemorrhage, it was held that he had not acted in good faith although he had performed similar operations on previous occasions (see Sukaroo v. Kobiraj 14 cal. 566.) As regards the questionof consent it has been laid down by the Court of Criminal Appeal in England that an act unlawful per se

as being criminal cannot be rendered lawful because the person to whose detriment it is done consents (see Ratanlal's Law of Crimes, 15th Edition, page 193) . Any operation by a quack oculist is unlawful under section 34 of the Bombay Medical Practitioners Act. Consequently any consent though proved to have been voluntarily given to the operation cannot afford any valid defence to the quack oculist under section 88, Indian Penal Code. He would also be liable to be prosecuted under section 337 or 338, Indian Penal Code, if the act done by him results in an injury . The view taken by the Secretary, H.D., in his note at page 12 ante is correct.

O.C. P.N.M.

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5-8-41

U.R. to G.D. No. 6940, dated the 7th August 1941.

S.A.K.

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R.I.No. 6864 dated 2-8-41.

Submitted.

2. Please see R.L.A's opinion No. 6222, dated the 17th July 1941. The Board of Indian System of Medicine has recommended that the Tilak Maharashtra Vidyapeeth may be specified by Govt. as being authorised to hold qualifying examinations under section 22 sub-sec. 2 of the Bombay Medical Practitioners Act, 1938. (Pl. see the Board's Resolution at p. 3 ante). In his letter at p. 51 ante, the President of the Board of Indian Systems of edicine has however ~~the Board of Indian Systems of Medicine has~~ suggested that there should be an exam... Board which should be independent of all teaching institutions. The Surgeon General also agrees with this suggestion (p.49 ante). As the institutions authorised to hold qualifying and prior examinations are to be specified on the recommendation of the Board under sec. 22 sub-sec. (2) Govt. proposes to issue the memo. at pp. 55.56 ante to the Surgeon General requesting him to ascertain from the Board whether it agrees with the suggestion that there should be only one examination Board holding both the qualifying and prior examinations and that the Board should be independent of all recognised teaching institution in the Province. Before issuing the Memo, G.D. has requested the R.L.A. to confirm the presumption that the constitution of the proposed examination Board will not conflict with any of the provisions of the Bombay Medical Practitioners' Act, 1938.

S.A.K.
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3. Sub-section (2) of section 22 of the Bombay Medical Practitioner--ne--reference Bombay Medical Practitioners Act refers to 'institutions' which may be specified as being authorised to hold a qualifying examination. The wording used in sub-se ction (3) of sec. 22 is "examining body. Sub-section (5) of section 22 refers to 'bodies or institutions authorised under the section". Sub-section (6) refers to "body" . The word institution ' is also used in this connec4-tion in sec. 23. From the use of all these words it appears that the body to be authorised under sub-section (2) of section 22 need not necessarily be "an institution". An examination Board can be so authorized as a body to conduct examinations. "A Board " means a number of persons having the management, direction or superintendence of some public or ~~xxx~~ private office or trust". (p. 143 of Ramanath Iyer's Law Lexicon). The proposed Board can be said to be a body within the meaning of sub-sections (3) , (5) and (6) of section 22. The exact constitution of the proposed examination Board is not known butthee constitution of such a Board would not, it appears, conflict with any of the provisionsof the Bombay Medical Practitioners Act. There is nothing in the Act also to sug est that a teaching institution shouldbe authorized to hold qualifying and prior examinations and not an independent body such as the one now proposed to be constituted.

A-. S. The presumption made by R.D. is correct. Papers may be seen and returned.

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The presumption made by G.D. is correct.
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U.R.to G.D. No. 7071 dt. 11-8-41.

Office of the R.L.A.

The proviso to section 32 of the Bombay Medical Practitioners Act, 1938, provides for power of Government to direct that the provisions of this section shall not apply to any class of persons or in any specified area. Students who have passed from the Bombay Homeopathic College during the years 1938-1941 form a class of persond within the meaning of the proviso to section 32. Consequently there will be no legal objection to exempting such students from the operation of section 32.

O.C. P.N.M.

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U.R. to G.D. No. 7076, dated the 11th August 1941.

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Office of the R.L.A.

For making regulations under section 30(1) of the Bombay Medical Practitioners' Act, 1938, it does not seem to be very material as to how or from whom the substance or the wording of the proposed regulations originates but it is essential that the Board should obtain the previous sanction of the Provincial Governm-ent. It is the Board who is empowered to make the regulations under section 30(1) and it is necessary that the Board should pass a resolution adopting the regulations after they are sanctioned by Government. (Cf. Emperor vs. Shirinbai Sorabji, 42 B.L.R. 1060; R.L.A's opinion No. 3342 dated 17.4-~~42~~ 41). Consequently the regulations as amended by Government and sanctioned in the present case - the Government's previous sanction being duly communicated to the Board-should be sent to th e board for adoption thereof by a resolution before publishing them .

O.C. P.N.M.
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U.R. to G.D. No. 8306, dated the 22nd September 1941.

S.A.K.
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Office of the R.L.A.

Under section 32 of the Bombay Medical Practitioners Act, 1938, no person other than the persons mentioned in the section shall practise for personal gain any system of medi-cine, surgery, or midwifery. The words "personal gain" indicate that the person practising should derive some profit for himself from the practice. A medical practitioner derives such profit in the form of fees or other empluments given to him as consideration for the service rendered by him to his patients. So long as any such medical practitioner receives such fees or other emoluments he must be held to be practising for personal gain. Because he would eventually give away his profits to the war fund or any other charitable object, it cannot be held that he is not practising for personal gain within the meaning of section 32 of the Bombay Medical Practitioners Act. In this case Dr. Herstl promises to donate his whole income from his practice to the war fund. By this act he will not cease to practise for personal gain within the meaning of the section. There will be no objection however, under the section to his giving entirely grantuitou and free treatment to his patients without deriving any profit in which case he would not be held to be practising for personal gain. The view taken in the G.D. office note at pages 6-12 ante is correct.

C.O.C. P.N.M.
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U.R. to G.D. No. 360-L dated the 30th October 1941

S.A.K.

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Office of the R.L.A.

Under section 32 of the Bombay Medical Practitioners Act, 1938, no person other than the persons mentioned in the section shall practise for personal gain any system of medi-cine, surgery, or midwifery. The words "personal gain" indicate that the person practising should derive some profit for himself from the practice. A medical practitioner derives such profit in the form of fees or other empluments given to him as consideration for the service rendered by him to his patients. So long as any such medical practitioner receives such fees or other emoluments he must be held to be practising for personal gain. Because he would eventually give away his profits to the war fund or any other charitable object, it cannot be held that he is not practising for personal gain within the meaning of section 32 of the Bombay Medical Practitioners Act. In this case Dr. Herstl promises to donate his whole income from his practice to the war fund. By this act he will not cease to practise for personal gain within the meaning of the section. There will be no objection however, under the section to his giving entirely gratuitou and free treatment o his patients without deriving any profit in which case he would not be held to be practising for personal gain. The view taken in the G.D. office note at pages 6-12 ante is correct.

C.O.C. P.N.M.
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U.R. to G.D. No. 360-L dated the 30th October 1941

S.A.K.

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